Supreme Court, U.S.
FILED
081375 MAY 6 - 2009
OFFICE OF THE CLERK

No.

# In the Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULES,
*Petitioners*,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), "precludes application of a federal statute" that would "invalidate, impair, or supersede" a state law "enacted * * * for the purpose of regulating the business of insurance." The questions presented in this case are:

1. Whether a state workers' compensation law that transfers the risk of workplace injuries to employers, and requires that employers secure their ability to assume those risks either by purchasing insurance or by self-insuring, regulates the "business of insurance" within the meaning of the McCarran-Ferguson Act.

2. Whether a State's exclusive, administrative remedial scheme for handling contested workers' compensation benefit determinations is impaired within the meaning of the McCarran-Ferguson Act by the availability of suits under the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, contesting the denial of workers' compensation claims.

## RULE 29.6 STATEMENT

Cassens Transport Company is wholly owned by Cassens Corporation. No publicly held company owns 10% or more of the stock of Cassens Transport Company or Cassens Corporation. Crawford & Company has no parent company and is publicly traded. No publicly held company owns 10% or more of the stock of Crawford & Company.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Cassens Transport Company ("Cassens"), Crawford & Company ("Crawford"), and Dr. Saul Margules respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-31a) is reported at 546 F.3d 347. The decision of the district court (*id.* at 32a-73a) is reported at 409 F. Supp. 2d 793.

## JURISDICTION

The judgment of the court of appeals was entered on October 23, 2008. A petition for rehearing was denied on January 5, 2009. App., *infra*, 74a. On March 26, 2009, Justice Stevens granted an extension of time within which to file a petition for writ of certiorari to May 6, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in the Appendix: Section 2(b) of the McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 34, as amended, 15 U.S.C. § 1012(b); and the civil remedy provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), codified at 18 U.S.C. §§ 1961 *et seq.* App., *infra*, 75a-83a.

## STATEMENT

Section 2(b) of the McCarran-Ferguson Act ("the Act"), 15 U.S.C. § 1012(b), provides, in relevant part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by

any State for the purpose of regulating the business of insurance." The Act thus reserves to the States the authority to regulate insurance. This case concerns the application of the Act to Michigan's workers' compensation statute.

Under Michigan law, workers' compensation benefits are a form of "insurance of a social character" (*Lauder* v. *Paul M. Wiener Foundry*, 72 N.W.2d 159, 172 (Mich. 1955)), in which the risk of workplace injury is transferred from employees to employers. Michigan law closely regulates, in parallel fashion, the obligations both of employers who self-insure their risk of workers' compensation liability and of those who purchase insurance coverage of that risk from third parties. But in the decision below, the Sixth Circuit held that the McCarran-Ferguson Act does not preclude invocation of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, by plaintiffs who allege fraudulent denial of workers' compensation benefits on the part of a Michigan employer that self-insures its workers' compensation risk. The court offered three rationales for this holding: (1) that state workers' compensation statutes do not regulate insurance because, in the court's view, an insurance contract between employee and employer does not exist in the workers' compensation context; (2) that self-insurance does not qualify as "insurance" under the Act; and (3) that federal RICO suits would not interfere with Michigan's exclusive administrative system of workers' compensation.

Each of these determinations is wrong, and each is troubling in significant respects. The Sixth Circuit misunderstood the application of the McCarran-

Ferguson Act to workers' compensation regimes, like the one in Michigan, that rest on implied contractual arrangements transferring the risk of workplace injuries to employers. Its holding also departs from decisions of this Court making clear that self-insurance *is* "insurance." And it is manifest that the streamlined efficiency of administrative workers' compensation regimes will be substantially impaired if plaintiffs may challenge benefit determinations through the medium of federal RICO suits. Because the Sixth Circuit's decision will interfere with state insurance regulation, threatens radical disruption of state workers' compensation arrangements, and involves what is sure to be a recurring issue of enormous practical importance, further review is warranted.

### A. Statutory Background

1. The McCarran-Ferguson Act "transformed the legal landscape by overturning the normal rules of pre-emption" and imposing in their place the principle that "state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 507 (1993). Thus, a federal law (such as RICO) is "reverse preempted" by the McCarran-Ferguson Act (*i.e.*, has no effect) if its "application to the * * * claims at issue" would (1) "invalidate, impair, or supersede" a (2) state law enacted "for the purpose of regulating the business of insurance." *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 307 (1999) (internal quotation marks omitted).

A state law is enacted "for the purpose of regulating the business of insurance" if it is "aimed at protecting or regulating this relationship [between in-

surer and insured], directly or indirectly." *Fabe*, 508 U.S. at 501 (bracketed material in original). The state law need not *itself* constitute the "business of insurance" or "directly regulate the 'business of insurance'" (*id.* at 502-04), so long as it "possess[es] the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Id.* at 505 (citation omitted). In turn, whether a practice constitutes the "business of insurance" depends on three factors, none by itself determinative: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982).

As for the other element of McCarran-Ferguson reverse preemption, "to impair a law is to hinder its operation or frustrate [a] goal of that law." *Humana*, 525 U.S. at 311 (internal quotation marks omitted). A federal law impairs state law in this sense if it "directly conflict[s] with state regulation," "frustrate[s] any declared state policy," or "interfere[s] with a State's administrative regime." *Ibid.* (internal quotation marks omitted).

2. The aim of the Michigan workers' compensation system is "compensation, not damage." *Lauder*, 72 N.W.2d at 172 (internal quotation marks omitted). To accomplish this end, the Michigan Worker's Disability Compensation Act ("WDCA") makes the right to recovery of workers' compensation benefits an employee's exclusive remedy (with certain narrow exceptions not implicated here) for a non-intentional workplace injury (MICH. COMP. LAWS § 418.131(1)),

while also making all such injuries compensable regardless of fault or other traditional common-law defenses. *Id.* § 418.141. The WDCA does this by incorporating into every contract of employment implied contractual terms allocating liability for workplace injuries to the employer in the first instance. See *Brown* v. *Eller Outdoor Advertising Co.*, 360 N.W.2d 322, 326 (Mich. Ct. App. 1984) (per curiam). In doing so, the WDCA transfers the risk of injury from the employee to the employer: an employee "who receives a personal injury arising out of and in the course of employment" by a covered employer "shall be paid compensation as provided in this act." MICH. COMP. LAWS § 418.301(1).

Michigan employers may secure their liability for payment of such workers' compensation benefits in one of two ways. First, the employer may "insur[e] against liability" by obtaining a workers' compensation insurance policy from an "insurer authorized to transact the business of worker's compensation insurance." MICH. COMP. LAWS § 418.611(1)(b). Every such policy must contain the provisions for coverage and benefits set forth in the WDCA. *Id.* § 418.621(4). In particular, the insurer must "pay to the persons that may become entitled thereto all workers' compensation for which the insured employer may become liable under the [WDCA's] provisions." *Id.* § 418.621(4)(a).

Alternatively, the employer may "receiv[e] authorization from the [D]irector [of the Bureau of Workers' Compensation]" to be a self-insurer. MICH. COMP. LAWS § 418.611(1)(a). Employers who establish a self-insured, or self-funded, plan pay employees directly, instead of purchasing insurance for their employees from a third party. See generally *Metro.*

*Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 742 (1985) (describing self-insurance). A Michigan employer may self-insure its workers' compensation liability only after making a "reasonable showing * * * of the employer's solvency and financial ability to pay the compensation and benefits provided for in" the WDCA. MICH. COMP. LAWS § 418.611(1)(a); see MICH. ADMIN. CODE R. 408.43b(3). As a general matter, self-insured employers also must retain an approved claims-handling company to administer claims. MICH. ADMIN. CODE R. 408.43a(5). Self-insured employers, just like insurers underwriting workers' compensation policies, must make payments to "employees as [they] become entitled to receive the payment under the terms and conditions of" the WDCA. MICH. COMP. LAWS § 418.611(1)(a).

**B. Proceedings Below**

1. Petitioner Cassens is an approved workers' compensation self-insurer under the WDCA and contracted with petitioner Crawford for claims adjustment and administration services. App., *infra*, 3a. Respondents are current or former employees of Cassens whose claims for workers' compensation under the WDCA were denied. They brought suit against Cassens, Crawford, and petitioner Margules (a physician who evaluated claims for workers' compensation benefits), alleging that petitioners fraudulently denied them benefits in violation of RICO. *Id.* at 1a-3a.

The district court granted petitioners' motion to dismiss, holding the RICO claim reverse preempted under the McCarran-Ferguson Act. App., *infra*, 57a-

64a.[1] The district court reasoned that the "WDCA does, in fact, regulate the business of insurance" because it "transfers or spreads * * * risk" and is an "integral part of [the] policy relationships between [the] insurer and [the] insured." *Id.* at 59a-61a (internal quotation marks omitted). The court added that allowing respondents' RICO claim to go forward would impair the operation of the WDCA. *Id.* at 61a-64a.

The district court explained that the WDCA "transfers or spreads * * * risk" because, "[a]s the Michigan Supreme Court has opined, '[t]he primary purpose of the * * * [WDCA] is to provide benefits to the victims of work-related injuries by allocating the burden [of] these payments to the employer and, therefore, ultimately, to consumers.'" App., *infra*, 59a (quoting *Simkins* v. *Gen. Motors Corp.*, 556 N.W.2d 839, 843 (Mich. 1996)). Rejecting respondents' argument that the provision of workers' compensation benefits does not "compris[e] insurance," the district court observed that the "WDCA simply deprives the parties of their freedom of contract and, instead, imposes the benefits and burdens of the predetermined bargain upon them." *Id.* at 61a. As such, an employer

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[1] The district court also held that the complaint failed to state a RICO claim because it did not plead reliance on petitioners' alleged misrepresentations. App., *infra*, 56a-57a. The Sixth Circuit initially affirmed that ruling (*Brown* v. *Cassens Transp. Co.*, 492 F.3d 640, 646 n.5 (6th Cir. 2007)), but this Court vacated the judgment and remanded for reconsideration in light of *Bridge* v. *Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131 (2008), which held that a civil RICO plaintiff need not show detrimental reliance. On remand, the court of appeals held in the decision below that respondents' RICO claim was sufficiently pled to survive a motion to dismiss. App., *infra*, 2a. That issue is not now before the Court.

who "elect[s] to self-insure its obligation to provide workers' compensation benefits to its employees * * * in effect[] stands in the stead of an insurance company" guaranteeing payment of those obligations. *Id.* at 60a.

The district court also concluded that a RICO claim challenging the denial of workers' compensation benefits would interfere with the WDCA's remedial scheme "because the RICO Act, in affording treble damages and a private right of action, provides [respondents] greater recourse than that which the WDCA provides." App., *infra*, 62a. Although "applying the RICO Act here would neither invalidate nor supersede the WDCA" – because the wrongful denial of workers' compensation benefits as part of a fraudulent enterprise would violate both the WDCA and RICO – doing so would "render Plaintiffs eligible for damages beyond those which the WDCA permits" and so "turn on its head the policy balance that the Michigan legislature struck in the WDCA." *Id.* at 62a-64a.

2. The Sixth Circuit reversed, holding that respondents' RICO claim is not reverse preempted by the McCarran-Ferguson Act because, in the court's view, (1) the WCDA was not enacted for the purpose of regulating the business of insurance and (2) even if were, the claim here would not invalidate, impair, or supersede the WDCA. App., *infra*, 15a-27a. (The Sixth Circuit agreed with the district court that RICO does not specifically relate to the business of insurance. *Id.* at 16a n.5.)

On the first of these points, the Sixth Circuit concluded that the "insurance-like impression" of workers' compensation benefits (*i.e.*, "they provide compensation for injuries like many forms of insur-

ance") was "solely a matter of appearance." App., *infra*, 19a. The court thus rejected the notion that, in the workers' compensation context, the employer serves as the insurer, the employee as the beneficiary, and the workers' compensation payment as the insurance proceeds (what the court labeled the "benefits-as-insurance" theory). *Ibid.* The court reasoned that "[i]nsurance is defined as '[a] contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk,'" and thought that "[t]here is no contract in the worker's compensation scheme." *Ibid.* Instead, in the court's view "[t]he WDCA is a public regulation of the employment relationship that is a substitute for the tort system rather than any contractual relationship between employees and employers." *Id.* at 20a. As a consequence, the court concluded that the WDCA was not enacted for the purpose of regulating the business insurance. *Id.* at 19a-21a.

In reaching this conclusion, the Sixth Circuit also rejected what it termed the "insurance-provisions theory," which posits that the WDCA regulates the business of insurance because it contains provisions that govern insurance contracts purchased by employers to cover their workers' compensation risk. App., *infra*, 23a-24a. The court of appeals recognized that "[t]here are several provisions of the WDCA that directly relate to the terms of the insurance contract [between the employer and insurer] and thus to 'the business of insurance'" (*id.* at 23a), but it deemed those provisions irrelevant to the issue whether the WDCA was enacted for the purpose of regulating the business of insurance. The court declared it "crucial" to this holding that "Cassens self insures" (*id.* at 24a), reasoning that "self-insurance does not relate to the 'business of insurance' under the McCarran-

Ferguson Act because there is no relationship between an insurer and an insured." *Ibid.*

The Sixth Circuit went on to hold in the alternative that "RICO is also saved from reverse preemption by the WDCA * * * because RICO would not 'invalidate, impair, or supersede' the WDCA." App., *infra*, 24a. The court recognized that RICO and the WDCA offer very different remedies: RICO provides for treble damages, while the WDCA offers only limited administrative penalties for wrongful failure to pay benefits due. *Id.* at 26a. But despite this difference, the court offered two reasons for finding no impairment. First, pointing again to Cassens' status as a self-insurer, the court held that, "because Cassens self-insures, there is no risk of any impairment of the state policy relating to the regulation of insurance." *Id.* at 26a. And relying on this Court's decision in *Humana Inc.* v. *Forsyth*, 525 U.S. 299 (1999), the Sixth Circuit found it dispositive that the WDCA does not *expressly* address "*fraudulent* denial of worker's compensation benefits." App., *infra*, 26a-27a. Although the court pointed to nothing in Michigan law authorizing the award of treble or punitive damages for the fraudulent denial of workers' compensation benefits, it believed that a RICO suit pursuing enhanced remedies for fraud "would not contravene any '*declared* state policy or interfere with [the State's] administrative regime.'" *Id.* at 27a (quoting *Humana*, 525 U.S. at 310) (emphasis and bracketed material added by the court of appeals).

## REASONS FOR GRANTING THE PETITION

Workers' compensation programs like the one in Michigan establish efficient administrative processes that transfer the risk of workplace injuries from employees to employers. In such regimes, the entitle-

ment to workers' compensation payments is included as an implied term in every contract of employment. State law assures that the employer, which is effectively insuring against the risk of workplace injury, is able to meet this obligation by either obtaining a workers' compensation insurance policy from an insurance company or by seeking authorization to self-insure its workers' compensation risk; in the latter case, the employer must retain an approved claims-handling company to administer claims. When establishing such workers' compensation programs – which create liability without fault, but also limit the size of payments for injury – States have carefully balanced the interests of employees and employers.

The decision below, however, overturns state policy choices regarding the regulation of insurance in the workers' compensation context, grossly distorting state programs of workers' compensation. That holding introduces burdensome and expensive federal RICO litigation into what had been closed, low-cost, and efficient administrative programs to resolve employee claims. This destructive effect is greatly compounded by the availability of treble damages and attorneys' fees under RICO, which change the incentives and burdens that States have made essential aspects of their workers' compensation insurance programs. Such an outcome directly frustrates the historic authority of the States, codified in the McCarran-Ferguson Act, to regulate the business of insurance. Because the Sixth Circuit's decision approving such a result departs from this Court's decisions under the Act, introduces significant confusion into the law, and is one of enormous practical importance, review by this Court is warranted.

## I. STATE WORKERS' COMPENSATION PROGRAMS THAT REQUIRE EMPLOYERS TO ASSUME THE RISK OF WORKPLACE INJURIES, EITHER BY PURCHASING INSURANCE OR BY SELF-INSURING, REGULATE THE BUSINESS OF INSURANCE

The Sixth Circuit's ruling that the WDCA does not involve the business of insurance is hardly a model of clarity, but it plainly rests on two central and essential elements. First, the court held that workers' compensation categorically is not insurance because, in the Sixth Circuit's view, workers' compensation does not involve a "contractual insurance relationship." App., *infra*, 20a. Second, the court regarded as irrelevant Michigan's regulation of the nature of the workers' compensation benefits that must be provided by employers – including requirements imposed identically on employers who self-insure their workers' compensation risks and on those who purchase insurance of those risks – because Cassens self-insures and the court believed that self-insurance does not involve the business of insurance under the McCarran-Ferguson Act. *Id.* at 22a-24a. But both aspects of this analysis are wrong. They depart from this Court's precedent, will lead to inconsistent treatment of identically situated businesses, and will frustrate state policy regarding both insurance and workers' compensation.

### A. Workers' Compensation Programs Like Michigan's, Which Transfer The Risk Of Injury, Regulate The Business Of Insurance

The Sixth Circuit recognized that "worker's compensation benefits may seem to act as a form of insurance because they provide compensation for inju-

ries like many forms of insurance." App., *infra*, 19a. The court of appeals surely was correct about that: workers' compensation under the WDCA transfers the risk of workplace injury from the employee to the employer, without regard to fault or other possible defenses on the employer's part. The Sixth Circuit nevertheless held that this risk transfer does not involve insurance because insurance requires a contract between the insurer and the insured and, the court believed, "[t]here is no contract in the worker's compensation scheme." *Ibid.* Instead, according to the Sixth Circuit, the WDCA created "a legislative remedy regarding the tort-liability relationship between employees and their employers, not an insurance contract." *Id.* at 20a.

But this categorical determination that workers' compensation has no contractual, risk-spreading component, which takes no account of the actual content of the applicable state law, misunderstands the inquiry that governs under the McCarran-Ferguson Act. It was the district court that was correct, both in its view that "[t]he WDCA simply deprives the parties of their freedom of contract and, instead, imposes the benefits and burdens of the predetermined bargain upon them" (*id.* at 61a), and in its understanding of the relevance of that compelled contractual insurance relationship to application of the McCarran-Ferguson Act. The Sixth Circuit's contrary view, which was premised on a generic and seat-of-the-pants concept of workers' compensation, did more than distort Michigan law (although it surely did that); it announced a federal rule that inevitably will disrupt the mechanism by which States regulate insurance against the risk of workplace injuries. That holding turns on its head the McCarran-

Ferguson Act's assignment of regulatory authority in this area to the States.

1. As Michigan law illustrates, the Sixth Circuit was incorrect in its belief that "[t]here is no contract in [a] worker's compensation scheme." App., *infra*, 19a. As this Court has itself recognized, Michigan courts have held that workers' compensation benefits under the WDCA are "more analogous to contractual damages than tort damages." *Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 188 (1992) (citing *Wilson* v. *Doehler-Jarvis Div. of Nat'l Lead Co.*, 100 N.W.2d 226, 229-230 (Mich. 1960), and *Brown*, 360 N.W.2d at 326). As a matter of Michigan law, an employee's right to an award of workers' compensation benefits under the WDCA "arises out of the contractual relationship between employers and employees." *Nat'l Union Fire Ins. Co.* v. *Richman*, 517 N.W.2d 278, 280 (Mich. Ct. App. 1994) (per curiam); *accord Selk* v. *Detroit Plastic Prods.*, 345 N.W.2d 184, 188 (Mich. 1984) ("[T]his Court has characterized workers' compensation as a liability arising out of the contract of employment."); *Lahti* v. *Fosterling*, 99 N.W.2d 490 (Mich. 1959). By operation of law, the WDCA thus "becomes a part of every contract of employment." *Brown*, 360 N.W.2d at 326. This feature of Michigan law is common to many States' workers' compensation schemes.[2]

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[2] See, *e.g.*, *King Mfg.* v. *Meadows*, 127 P.3d 584, 589 (Okla. 2005) ("The right of an employee to compensation arises from the contractual relationship existing between the employee and the employer on the date of injury. The statutes then in force form a part of the contract * * *."); *Krahwinkel* v. *Commonwealth Aluminum Corp.*, 183 S.W.3d 154, 157 (Ky. 2005) ("Workers' compensation coverage is a voluntary contract between employer and employee, the terms of which are defined

Although a State's characterization of particular contracts is not conclusive as to whether they constitute "part of the 'business of insurance' under McCarran-Ferguson" (*Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 369 n.5 (2002)), such classifications are undoubtedly "relevant to the enquiry, because Congress, in leaving the 'business of insurance' to the States, 'was legislating concerning a concept which had taken on its coloration and meaning largely from state law, from state practice, from state usage.'" *Ibid.* (quoting *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959)). The Sixth Circuit accordingly went astray in adopting an approach to the McCarran-Ferguson Act that does not reflect any

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by the provisions of the Act."); *Dodge* v. *Precision Constr. Prods., Inc.*, 820 A.2d 207, 214 (Vt. 2003) ("A worker's right to compensation benefits stems from his employment contract: * * * the Act becomes a part of the contract."); *Allstate Ins. Co.* v. *Eagle-Picher Indus., Inc.*, 410 N.W.2d 324, 328 (Minn. 1987) ("The rights afforded by the Workers' Compensation Act are incidents of the employment relationship and are contractual in nature."); *Yocum* v. *Phillips Petroleum Co.*, 612 P.2d 649, 653 (Kan. 1980) ("The workmen's compensation law has also been held to be contractual in nature * * * with the terms and provisions of the statute being incorporated into the employment contract."); *Turner* v. *S. Wheel & Rim Serv., Inc.*, 332 So. 2d 770, 771 (La. 1976) ("The obligation is a statutory incident to the employment contract, and thus the benefits are awarded upon the theory that the statute is read into and becomes a part of the contract of employment."); *Jones* v. *Laird Found., Inc.*, 195 S.E.2d 821, 824 (W.Va. 1973) ("Workmen's Compensation is contractual in nature, as the provisions of the Workmen's Compensation Act become an integral part of the contract of employment between the employer and employee."); *Glassco* v. *Glassco*, 77 S.E.2d 843, 844 (Va. 1953) ("[T]he statute reads into every contract of employment * * * the obligation of the employer to pay, and the right of the employee or his dependents to recover, such benefits.").

consideration of how Michigan law actually treats workers' compensation benefits.

Had the Sixth Circuit engaged in the proper analysis, it would have concluded that the WDCA is aimed at regulating the business of insurance. As the Michigan courts have long recognized, workers' compensation benefits under the WDCA are a form of "insurance of a social character" between employees and employers, the contractual terms of which are fixed by law. See *Lauder*, 72 N.W.2d at 172. And this Court has repeatedly recognized that state laws regulating the substantive terms of insurance contracts are laws directed at regulating the "business of insurance." *Metro. Life*, 471 U.S. at 743-744. Indeed, "[t]he relationship between insurer and insured" and "the type of policy which could be issued" both lie at the "*core* of the 'business of insurance.'" *SEC* v. *Nat'l Sec., Inc.*, 393 U. S. 453, 460 (1969) (emphasis added). A "mandatory contract term * * * dictates the terms of the relationship between the insurer and the insured, and consequently, is integral to that relationship." *UNUM Life Ins. Co.* v. *Ward*, 526 U.S. 358, 374 (1999) (internal quotation marks omitted). That describes the situation here.[3]

2. The Sixth Circuit also departed from this Court's approach when it concluded that the WDCA

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[3] The Sixth Circuit concluded that an "employer is not akin to an insurer because it had a preexisting duty under common law to compensate for workplace injuries." App., *infra*, 20a. But the WDCA requires Michigan employers to accept a contractual obligation to compensate injured employees that is quite unlike their duties at common law. Most importantly, employers are no longer entitled to assert defenses like contributory negligence, the fellow servant rule, and assumption of risk. See MICH. COMP. LAWS § 418.141.

was not "enacted * * * for the purpose of regulating the business of insurance" because the "provisions relating to insurance policies within the WDCA were included merely to effectuate the WDCA's primary goal of employee compensation." App., *infra*, 22a. This reasoning rests on a misunderstanding of this Court's reading of the McCarran-Ferguson Act's language, which recognizes that that "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance'" is *more* expansive "than just the 'business of insurance.'" *Fabe*, 508 U.S. at 505. Moreover, the court of appeals' analysis is circular, as it rests on the premise – which, as we have suggested, is incorrect – that the transfer of the risk of workplace injuries is not the business of insurance in the first place.[4]

In any event, that the WDCA was intended to protect the general welfare by providing a quick and certain remedy for workplace injuries, as the court of appeals correctly noted (App., *infra*, 21a-22a), hardly means that the legislation was not also meant to govern the resulting insurance relationship. The correct approach is to carefully "parse[] a state statute" with multiple goals. *Fabe*, 508 U.S. at 509 n.8. And here, a "primary purpose of the [WDCA] is to provide benefits to the victims of work-related injuries by allocating the burden of these payments to the employer." *Simkins*, 556 N.W.2d at 843.

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[4] Nor is the Sixth Circuit's conclusion established by its observation that the WDCA "is not limited to entities in the insurance industry" (App., *infra*, 21a); a state law is not required to satisfy all three McCarran-Ferguson criteria to qualify as a regulation of the business of insurance. See *Pireno*, 458 U.S. at 129.

The WDCA thus "dictates the terms" of, and is integral to, those elements of the contractual relationship between employees and employers that allocate the risk of workplace injuries. See *UNUM*, 526 U.S. at 374. Its provisions governing the obligation of self-insured employers to pay benefits to eligible employees ensure the performance of the risk-shifting terms that are implied, by operation of law, into every Michigan employment contract. See *Fabe*, 508 U.S. at 503. Respondents' RICO claim therefore implicates a state law enacted for the purpose of regulating the contractual spreading and transfer of risk – that is, the business of insurance.

### B. Self-Insurance Is Part Of The Business Of Insurance

The Sixth Circuit also went astray in its related holding – which it labeled "crucial" – that "self-insurance does not relate to the 'business of insurance' under the McCarran-Ferguson Act." App., *infra*, 24a. That understanding led the court to its conclusion that Michigan statutory provisions imposing parallel obligations on insurance companies and self-insurers are immaterial to the McCarran-Ferguson analysis, and that self-insurers are categorically excluded from application of the Act. That insupportable holding substantially undermines the efficacy of the McCarran-Ferguson Act.

1. To begin with, the Sixth Circuit's rule that self-insurance is not "insurance" cannot be squared with this Court's precedent. The conflict is brought into stark relief by two recent decisions of this Court involving challenges to state laws brought by health maintenance organizations (HMOs). See *Kentucky Ass'n of Health Plans, Inc.* v. *Miller*, 538 U.S. 329

(2003); *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355 (2002).[5]

In *Miller*, the Court considered a Kentucky state law requiring health insurers to accept as participating providers any provider willing to abide by the insurer's terms and conditions. 538 U.S. at 331-332. The insurers argued that the law was not "specifically directed toward" insurance because it reached not only traditional health insurers, but also "self-insured * * * plans." *Id.* at 336 n.1 (internal quotation marks omitted). The Court made short shrift of this argument: "[S]elf-insured plans engage in the same sort of risk pooling arrangements as separate entities that provide insurance to an employee benefit plan." *Ibid.*; see also *Gen. Elec. Co.* v. *Gilbert*, 429 U.S. 125, 138 n.16 (1976) ("That General Electric self-insures does not change the fact that it is, in effect, acting as an insurer * * *.") (superseded by statute on other grounds, as stated in *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 676 (1983)).

Similarly, in *Rush Prudential* the petitioner HMO argued that a state statute did not regulate insurance because it was directed at HMOs, which the petitioner maintained were providers of health care services rather than insurers. 536 U.S. at 366-67. The Court was unpersuaded. It explained that an

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[5] Although *Miller* and *Rush Prudential* arose under the Employee Retirement Income Security Act of 1974 (ERISA), they establish that a self-insured entity must, under some circumstances, be treated as an insurer. ERISA preempts state laws that "relate to any employee benefit plan" except those that are "specifically directed toward" insurance. See *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 50 (1987); 29 U.S.C. § 1144(a), (b)(2)(A).

HMO's defining feature "'is receipt of a fixed fee for each patient enrolled under the terms of a contract to provide specified health care if needed. The HMO thus assumes the financial risk of providing the benefits promised * * *.'" *Id.* at 367 (citation omitted). For this reason, HMOs are "risk-bearing organizations" in that they assume financial responsibility for payment of their enrollees' claims. *Pegram*, 530 U.S. at 219. The contractual arrangement between an HMO and an enrollee transfers risk to the HMO, which in turn distributes that risk over persons (*i.e.*, other enrollees in the HMO's pool) and over time. HMOs therefore "actually underwrite and spread risk among their participants, a feature distinctive to insurance." *Rush Prudential*, 536 U.S. at 367 (citations omitted). That HMOs also provide enrollees their contracted-for benefits (*i.e.*, medical care) does not detract from their "insurance features." *Id.* at 370.[6]

*Miller* and *Rush Prudential* both reject the Sixth Circuit's formalistic conception of insurance, which focuses on whether there is a traditional insurance policy denominated as such, rather than on whether the practice at issue effects the contractual spreading or transfer of risk. In every respect relevant here, employers who self-insure workers' compensation are identically situated to the HMOs in *Rush Prudential*

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[6] Even an HMO that provides only "medical matchmaker" services between a self-funded plan and health care providers, and does not itself bear any risk, "would fall within the insurance industry." *Rush Prudential*, 536 U.S. at 372, 375. This analysis demonstrates the error of the Sixth Circuit's decision with respect to petitioners Crawford and Margules, because adjusters of insurance claims are entities within the insurance industry. See *Pireno*, 458 U.S. at 134 n.8.

and the self-insured plans in *Miller*: through a contract whose terms are specified by the WDCA, they have assumed responsibility for others' risks (*i.e.*, employees suffering compensable workplace injuries) and undertaken to deliver the contracted-for benefits themselves (*i.e.*, workers' compensation payments). The WDCA's regulation of this contractual relationship is quintessentially a regulation aimed at "adjusting, managing, or controlling the business of insurance." *Fabe*, 508 U.S. at 505.

The court of appeals' departure from this Court's precedents led the Sixth Circuit to a serious and consequential misunderstanding of the McCarran-Ferguson Act. The court acknowledged that workers' compensation benefits guarantee against the risk of workplace injury by "provid[ing] compensation for injuries like many forms of insurance." App., *infra*, 19a. Employers are obligated to insure against that potential liability, either by purchasing insurance or by self-insuring. The obligations of both sets of employers are identical; indeed, a third-party insurer's obligation is, by statute, derivative of the employer's. See MICH. COMP. LAWS §§ 418.301, 418.315, 418.319, 418.321, 418.621(4). By excluding self-insurers from the McCarran-Ferguson definition of insurance, the court below accordingly adopted a rule that leads to inconsistent treatment of identical risks depending upon whether the employer is self-insured or insured by a third party, and the consequent frustration of state policy relating both to insurance and to workers' compensation.

2. Moreover, the strict dichotomy drawn by the Sixth Circuit between self-insurers and those who purchase insurance disregards the insurance-specific requirements imposed upon self-insurers by States

with workers' compensation systems like Michigan's. It also ignores the practical realities of the "business of insurance" – and of insurance regulation – that makes such a distinction incoherent in the real world. As a consequence, the holding below reads into the McCarran-Ferguson Act an irrational distinction that will be impossible to administer.

The WDCA contains numerous provisions regulating the use of self-insurance to secure payment of workers' compensation benefits. Many self-insured employers, for example, are required to obtain "excess liability insurance, with policy limit and retention acceptable to" the Bureau of Workers' Compensation, before they are permitted to self-insure. MICH. ADMIN. CODE R. 408.43a(3); cf. *Rush Prudential*, 536 U.S. at 371 (explaining that neither a "reinsurance contract" nor insurance "cover[ing] a portion of the risk * * * assume[d]" takes "the primary insurer out of the insurance business"). There can be no doubt that this is insurance in every sense.

Similarly, the WDCA provides for reinsurance of self-insured employers through a Second Injury Fund and self-insurers' security fund. MICH. COMP. LAWS § 418.501(1). The Second Injury Fund is an "insurance scheme" that spreads the risk of certain losses due to "worker's compensation among all the self-insured employers and carriers." *McAvoy* v. *H.B. Sherman Co.*, 258 N.W.2d 414, 429 (Mich. 1977). The self-insurers' security fund "provide[s] a source of compensation benefits following insolvency" of a self-insured employer (*Gomez* v. *Campbell, Wyant & Cannon Foundry*, 259 N.W.2d 400, 402 (Mich. Ct. App. 1977)), and thus shifts "compensation liability of the insolvent self-insured employer" to that fund. *McQueen* v. *Great Markwestern Packing Co.*, 262

N.W.2d 820, 822 (Mich. 1978) (internal quotation marks omitted).

These provisions of the WDCA can only be understood as reflecting the Michigan legislature's determination that self-insured employers should stand in the same shoes as insurance companies vis-à-vis workers' compensation benefits. That judgment reflects the practical realities of the business of insurance: the Sixth Circuit's strict distinction between traditional insurance and self-insurance does not recognize the multitude of arrangements for securing payment of workers' compensation benefits that include elements both self- and paid insurance.[7] The

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[7] As a practical matter, for example, "[e]mployers who have policies with deductibles are, in effect, self-insuring up to the amount of the deductible. That is, they are bearing that portion of the financial risk." National Academy of Social Insurance, *Workers' Compensation: Benefits, Coverage, and Costs*, 2006, at 15-16 (Aug. 2008), available at http://www.nasi.org/usr_doc/NASI_Workers_Comp_Report_2006.pdf; FLORENCE KAVALER & ALLEN D. SPIEGEL, RISK MANAGEMENT IN HEALTH CARE INSTITUTIONS, SECOND EDITION: A STRATEGIC APPROACH 118-19 (2003) (discussing growth in "large deductible" plans). Moreover, workers' compensation insurance policies are sold to many employers on an "experience rated" or "retrospectively rated" basis. C. ARTHUR WILLIAMS, JR., AN INTERNATIONAL COMPARISON OF WORKERS' COMPENSATION 192-193 (1991). Under such policies, the "insurer sets a price based on the [employer's] recent and predicted losses," such "that almost all of the time the insured firm pays the full costs of the losses it generate." *Sears, Roebuck & Co.* v. *Comm'r*, 972 F.2d 858, 862 (7th Cir. 1992). And employers often obtain coverage through "rent-a-captives," a self-insurance-like arrangement in which employees' claims are paid out of a segregated account that is funded entirely by the employer's premium payments. Christopher L. Culp, *Alternative Risk Transfer*, *in* RISK MANAGEMENT 374 (Michael Frenkel, et al. eds., 2004); PETER M. LENCSIS, WORKERS COMPENSATION: A REFERENCE AND GUIDE 82 (1998). These ar-

court of appeals' blanket declaration that self-insurance can never relate to the business of insurance therefore rests on a fundamental misunderstanding of the McCarran-Ferguson Act that inevitably will disrupt the state regulation of insurance.

## II. RICO ACTIONS BROUGHT BY AGGRIEVED WORKERS' COMPENSATION CLAIMANTS WOULD INTERFERE WITH STREAMLINED STATE ADMINISTRATIVE PROCESSES FOR REDRESSING WORKPLACE INJURIES

As an alternative holding, the Sixth Circuit also reasoned that respondents' RICO claim is "saved from reverse preemption by the WDCA under the McCarran-Ferguson Act because RICO would not 'invalidate, impair, or supersede' the WDCA." App., *infra*, 24a. The rationales relied upon by the Sixth Circuit in support of this conclusion, however, are inconsistent with decisions of this Court. Moreover, the principal basis for the court of appeals' decision on this point – which failed to engage in any independent consideration of the relevant state law – inevitably will lead to the very disruption of state policy that the McCarran-Ferguson Act was designed to avoid.

1. The Sixth Circuit's first rationale for finding no impairment of state law rested on its belief that, "because Cassens self-insures, there is no risk of any impairment of the state policy relating to the regulation of insurance." *Id.* at 26a. Once the analytical error that self-insurance never constitutes insurance is corrected, this reasoning has no independent sali-

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rangements demonstrate that clear lines cannot be drawn between those who self-insure and those who purchase insurance.

ence. Because the WDCA effects a contractual transfer of risk from employees to employers (self-insured or not), and because that transfer of risk is disrupted by RICO liability, the Sixth Circuit was wrong to altogether foreclose the possibility of impairment of state law within the meaning of the McCarran-Ferguson Act.

2. The Sixth Circuit's other ground for rejecting petitioners' impairment argument was its observation that the "WDCA provision regarding sanctions for failure to pay benefits does not appear to contemplate the *fraudulent* denial of worker's compensation benefits." *Id.* at 27a. The court thus took the absence of a WDCA provision expressly addressing fraudulent denial of benefits to mean that "a RICO suit would not contravene any '*declared* state policy or interfere with [the state's] administrative regime.'" *Ibid.* (quoting *Humana*, 525 U.S. at 310 (emphasis added by the court of appeals)). In reaching this conclusion, the court engaged in no independent review of the relevant state law to determine whether an action for fraudulent denial of workers' compensation benefits in fact is available in Michigan (see *id.* at 26a-27a), instead finding support in the State of Michigan's failure to file a brief below as an *amicus*. This analysis is wrong in several respects.

*First*, the Sixth Circuit appears to have conflated the question whether Michigan has a policy *permitting* what federal law forbids with whether allowing a RICO suit to go forward would interfere with Michigan's *administrative regime* for addressing workers' compensation claims. Cf. *Humana*, 525 U.S. at 310 (federal law impairs state law if its application would "frustrate any declared state policy *or* interfere with a State's administrative regime") (em-

phasis added). Fraudulent denial of workers' compensation benefits as part of a racketeering scheme doubtless would violate Michigan law (although petitioners vigorously deny that they engaged in any such scheme). But this does not end the inquiry. Congress did not intend "a green light for federal regulation whenever the federal law does not collide head on with state regulation." *Humana*, 525 U.S. at 309.

*Second*, allowing respondents to bring a RICO suit would in fact disrupt Michigan's carefully calibrated system of remedies for aggrieved workers' compensation claimants. The Sixth Circuit itself noted that the WDCA makes workers' compensation "the exclusive remedy [for workplace injuries] except in cases of intentional torts." App., *infra*, 22a; see also MICH. COMP. LAWS § 418.631 (revoking insurance license or privilege of self-insurance if party "repeatedly or unreasonably fails to pay promptly claims"); *id.* § 418.801(2) (penalties, capped at $1500, if benefits are not paid "within 30 days after becoming due and payable"); *id.* § 418.847 (initial hearing procedure); *id.* § 418.859a (claims for review with appellate commission); *id.* § 418.861b (authorizing "disciplinary action" if "claim was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was meritorious issue to be determined"). The WDCA channels "*[a]ny* dispute or controversy concerning compensation or other benefits" to the Bureau of Worker's Compensation and provides that "*all* questions arising under [the WDCA] shall be determined" by that body or its designee. *Id.* § 418.841(1) (emphasis added). That includes, of course, all questions of "liability * * * regarding a claim under" the WDCA. *Id.* § 418.852(1);

*Sewell* v. *Clearing Mach. Corp.*, 347 N.W.2d 447, 450 (Mich. 1984) (per curiam).

The court of appeals failed to appreciate the significance of this regime because it does not appear to have engaged in any independent review of Michigan law – which would have revealed that *fraudulently* denied workers' compensation benefits are a subset of the broader category of *erroneously* denied benefits. Contrary to the Sixth Circuit's reasoning, there is no lacuna in the WDCA into which a fraudulent denial of workers' compensation claims would fall; fraud claims are treated in the same manner as any other claim that an employee has been denied benefits to which he or she is legally entitled. Michigan law commits all such questions of eligibility for workers' compensation benefits to the Bureau of Worker's Compensation. See MICH. COMP. LAWS § 418.841(1); *Maglaughlin* v. *Liberty Mut. Ins. Co.*, 267 N.W.2d 160, 161 (Mich. Ct. App. 1978).

Michigan does not provide a separate cause of action (common law or statutory) for challenging the intentional withholding of workers' compensation benefits. It does not, for example, permit an action for intentional infliction of emotional distress to be maintained when the allegation is that workers' "compensation benefits were wrongfully terminated * * * in order to further some ulterior motive" of the parties responsible for their payment. *Lisecki* v. *Taco Bell Rests., Inc.*, 389 N.W.2d 173, 175 (Mich. Ct. App. 1986) (per curiam); *Hajciar* v. *Crawford & Co.*, 369 N.W.2d 860, 864 (Mich. Ct. App. 1985) (per curiam). Thus, even allegations that the defendants "acted in collusion to 'wrongfully, wilfully and intentionally' deprive" the employee of benefits (*Lisecki*, 389 N.W.2d at 174), or that benefits were terminated to

coerce the employee into settling his claim for a lump sum (*Hajciar*, 369 N.W.2d at 861, 864), do not give rise to a judicially cognizable claim under Michigan law.[8] Michigan courts instead have held that the proper "remedy for the * * * [allegedly wrongful] termination of benefits" is the "filing of a petition for hearing with the Bureau of Worker's Disability Compensation." *Lisecki*, 389 N.W.2d at 175.[9] In this respect, Michigan's regime is typical of state workers' compensation systems.[10]

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[8] See also *Atkinson* v. *Farley*, 431 N.W.2d 95, 97 (Mich. Ct. App. 1988) ("wrongful, bad faith termination of benefits" did not "support a claim"); *Wright* v. *DaimlerChrysler Corp.*, 220 F. Supp. 2d 832, 844-845 & n.9 (E.D. Mich. 2002) ("[W]rongful, even bad faith refusal to offer benefits to which [the employer] is entitled is not tortious.").

[9] Many of the respondents in this very case have exercised that option and have been awarded workers' compensation benefits.

[10] Many workers' compensation systems, like that of Michigan, have administrative penalties for non-payment of benefits. And "[a] majority of courts have taken the view that [the provision of an administrative penalty] evidences a legislative intent that the remedy for delay in payments, even vexatious delay, shall remain within the system." LARSON ON WORKERS' COMPENSATION § 104.05[3], at 35 (2007). See, *e.g.*, *Breton* v. *Travelers Ins. Co.*, 147 F.3d 58, 61, 63 (1st Cir. 1998) (applying Maine law) ("[W]e think that the existence of a sum of money—albeit a small sum [$50 per day]—payable to the benefits claimant evidences the legislature's intent to confine disputes over delayed payments and other allegations of claims mishandling to the jurisdiction of the workers' compensation system."); *Cianci* v. *Nationwide Ins. Co.*, 659 A.2d 662 (R.I. 1995) ("Such a [statutory administrative] penalty is evidence of a legislative intent that the remedy for delay in payments should remain in the workers' compensation system * * *."); *Bergeron* v. *N. Am. Underwriters, Inc.*, 549 So.2d 315, 315 (La. 1989) (per curiam) ("The sole remedy for arbitrary failure to pay worker's compensation benefits is the recovery of penalties and attorney's fees * * *.");

*Third*, the Sixth Circuit missed all this because it evidently regarded as dispositive the absence of any state statutory provision *expressly* precluding suit for the fraudulent denial of benefits. But this approach is in conflict with *Humana* itself, in which this Court engaged in a close examination of Nevada law – including a review of the remedies that actually were available – to determine that a RICO suit would not impair that state's regulatory regime because "Nevada provides both statutory and common-law remedies to check insurance fraud" and "[v]ictims of insurance fraud may also pursue private actions" under the Unfair Insurance Practices Act. 525 U.S. at 311-312. Given the "existence of private rights of action under state law" and the availability of punitive damages under those causes of action, it was clear that RICO "complement[ed]" Nevada's regulatory scheme instead of impairing it. *Id.* at 312-13 & n.10.

The holding below also conflicts with the approach taken by other courts of appeals, which have followed *Humana* by engaging in a close review of the remedies available under state law – and have

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*Phillips* v. *Crawford & Co.*, 248 Cal. Rptr. 371, 373 (Cal. Ct. App. 1988) (10% penalty); *Garrett* v. *Washington Air Compressor Co., Inc.*, 466 A.2d 462, 464 (D.C. 1983) (10% fine); *Messner* v. *Briggs & Stratton Corp.*, 353 N.W.2d 363, 365-366 (Wis. Ct. App. 1984); *Hormann* v. *New Hampshire Ins. Co.*, 689 P.2d 837, 843-844 (Kan. 1984) (8% interest); *Bright* v. *Nimmo*, 320 S.E.2d 365, 368 (Ga. 1984) (15% penalty). But see *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991) (allowing action for wrongful non-payment but recognizing "the contrary position taken by a number of other courts and commentators who have concluded that a legislative scheme of administrative fines is the exclusive remedy for injured workmen who have been aggrieved by the bad faith or negligence of a self-insured employer in the processing and payment of claims for compensation").

held RICO suits reverse preempted by the McCarran-Ferguson Act when the State did not provide remedies comparable to those available under RICO. See, *e.g.*, *Saunders* v. *Farmers Ins. Exchange*, 537 F.3d 961, 967-969 (8th Cir. 2008); *LaBarre* v. *Credit Acceptance Corp.*, 175 F.3d 640, 643 (8th Cir. 1999). See also *Weiss* v. *First Unum Life Ins. Co.*, 482 F.3d 254, 268-269 (3d Cir. 2007) (no reverse preemption in light of available state remedies) *BancOklahoma Mortgage Corp.* v. *Capital Title Co.*, 194 F.3d 1089, 1099-1100 (10th Cir. 1999) (same).

The Sixth Circuit should have reached that conclusion in the face of Michigan's essentially closed system for handling workers' compensation claims. MICH. COMP. LAWS § 418.131 (exclusivity of remedy); § 418.841 (exclusive jurisdiction); § 418.861 (administrative findings of fact conclusive); see *Hebert* v. *Ford Motor Co.*, 281 N.W. 374, 375 (Mich. 1938) ("Proceedings under the workmen's compensation act are * * * []administrative, not judicial, []inquisitorial, not contentious, []disposed of not by litigation and ultimate judgment, but summarily."). Allowing plaintiffs to re-litigate workers' compensation disputes through RICO and to invoke the federal statute's exceptionally powerful remedies would impair Michigan's carefully developed administrative remedial scheme.

## III. THE QUESTIONS PRESENTED ARE ONES OF SUBSTANTIAL PRACTICAL SIGNIFICANCE

The issues presented here are ones of enormous practical importance: the court of appeals' holding reads significant limits into the McCarran-Ferguson Act, threatening to interfere with state insurance regulation and overturn the balance struck by States

in their workers' compensation systems. Most obviously, by categorically holding that state regulation of employers who self-insure their workers' compensation liability is outside the scope of the McCarran-Ferguson Act, the holding below invites a proliferation of RICO strike suits brought by aggrieved workers' compensation claimants. The attractiveness of RICO's remedies – including treble damages and attorney's fees, *e.g.*, 18 U.S.C. § 1964(c) – and the extraordinarily burdensome nature of RICO discovery assures that an ever-increasing volume of workers' compensation litigation will find its way to federal court for decision under federal law. See, *e.g.*, Cristin Schmitz, *Employers Face RICO Claims For Workers Comp Denials*, INSIDE COUNSEL (Feb. 1, 2009) (RICO permits "wide-open" discovery; plaintiffs' counsel states that if case goes to trial, "I am going to discover every single comp claim that ever existed in the past four years * * * so it's going to open a real can of worms"). To the extent that settlements are not compelled in such suits, federal courts will have to pass on the merits of the underlying workers' compensation claims, creating the potential for overlapping (and possibly conflicting) adjudication of eligibility for workers' compensation benefits.

Such an outcome would disrupt Congress's allocation of responsibility between the States and the federal government in matters of insurance regulation. See *Fabe*, 508 U.S. at 505. The broad availability of these claims would allow plaintiffs to circumvent the policy choices made by state legislatures and insurance regulators in favor of one-size-fits-all federal RICO claims. This is of particular consequence in the field of workers' compensation, which historically has been intended to "substitut[e] * * * a simple and inexpensive scheme for securing a

prompt settlement of claims" for costly and protracted judicial proceedings. 9A COUCH ON INSURANCE § 133:13 (2008 ed.); see also 28 U.S.C. § 1445(c) (forbidding removal of workers' compensation benefits claims to federal court).[11] Superimposing the federal RICO remedy onto that system would, at best, distort the state process by adding a new layer of satellite litigation to what had been a streamlined administrative regime; at worst, it would render "obsolete" the efficiencies of workers' compensation. *Bristol Hotel Mgmt. Corp.* v. *Aetna Cas. & Sur. Co.*, 20 F. Supp. 2d 1345, 1351 (S.D. Fla. 1998).

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[11] See, *e.g.*, *Dep't of Labor & Indus.* v. *Granger*, 153 P.3d 839, 843 (Wash. 2007) (en banc) (workers' compensation "is a self-contained system that provides specific procedures and remedies for injured workers"); *Davis* v. *Fayette County Comm'n*, 831 So. 2d 50, 53 (Ala. Civ. App. 2002) ("The Act is a specific and comprehensive system of law for dealing with workplace injuries. As such, it trumps general laws that might, at first glance, seem to apply."); *Maryland Cas. Co.* v. *Messina*, 874 P.2d 1058, 1063 (Colo. 1994) (en banc) ("The Workers' Compensation Act establishes an administrative process designed to adjudicate promptly a narrow issue of law containing limited legal questions[.]"); *Zundell* v. *Dade County Sch. Bd.*, 636 So. 2d 8, 12 (Fla. 1994) ("Workers' compensation is an administrative remedy designed to speed an employee's compensation while insulating both employer and employee from the costs and delays inherent in purely judicial adversarial proceedings."); *Sheets* v. *Hill Bros. Distribs., Inc.*, 379 S.W.2d 514, 516 (Mo. 1964) ("'The compensation act * * * is not supplemental or declaratory of any existing rule, right or remedy, but creates an entirely new right or remedy * * * [that] is wholly substitutional in character and supplants all other rights and remedies, at common law or otherwise.'"); *Crow* v. *City of Wichita*, 566 P.2d 1, 9 (Kan. 1977) ("[T]he Workers' Compensation Act is complete and exclusive within itself in establishing procedures covering every phase of the right to compensation * * *.").

The significance of such a rule cannot be denied. Even if limited to the industrialized States of the Sixth Circuit, the number of annual workers' compensation claims is enormous. And more broadly, in 2006, 130 million workers across the Nation were covered by workers' compensation programs. National Academy of Social Insurance, *Workers' Compensation*, *supra*, at 2. With the exceptions of North Dakota and Wyoming, which require employers to obtain coverage from state-run funds, every State allows financially eligible employers to self-insure their liability for workers' compensation benefits. *Id.* at 14. An increasing number of employers have opted for self-insurance; as of 2006, 24% of workers' compensation benefits were directly paid by self-insured employers. *Ibid.* The number of claims potentially affected by the rule announced below therefore is staggering. Because that rule is inconsistent with this Court's decisions in significant respects, further review is warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2009